

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re:) **1998 OAL Determination No. 28**
Request for Regulatory)
Determination filed by LINDA) [Docket No. 93-001]
THARP regarding the)
DEPARTMENT OF) **October 22, 1998**
CORRECTIONS, CALIFORNIA)
INSTITUTION FOR WOMEN,) **Determination Pursuant to**
criteria for approval of) **Government Code Section**
correspondence between) **11340.5; Title 1, California**
inmates¹) **Code of Regulations,**
_____) **Chapter 1, Article 3**

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
TAMARA J. PIERSON, Administrative Law Judge on
Special Assignment
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL"), by the requester in 1992, is whether the rule which prohibited, with specified exceptions, inmates from corresponding with other inmates or certain former inmates, was a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The challenged rule restricting correspondence was essentially the same as a proposed regulation previously disapproved by OAL, in 1990, for failure to comply with the substantive and procedural standards of the Administrative Procedure Act. The challenged rule was also virtually identical to a rule held to be

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invalid in a determination issued by OAL later that same year.

OAL has concluded that the challenged rule was a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

ISSUE

OAL has been requested to determine whether the rule restricting correspondence between inmates to immediate family members, established common law relationships with children in common, co-defendants, or co-litigants with a current case under appeal, is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA"). This request was filed by Linda Tharp, in 1992, while an inmate at the California Institution for Women.

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?

Penal Code section 5058, subdivision (a), declares in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]*. . . .
[Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments.² After this request was filed,³ Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements. [See section 5058, subdivisions (c)⁴ and (d)]. The applicability of one of these exemptions will be discussed below.

II. DO THE "CHALLENGED SECTIONS" CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

The key provision of Government Code section 11342, subdivision (g), defines "regulation" as:

" . . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,⁵ the California Court of Appeal upheld OAL's two-part test⁶ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g).

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule meets both parts of the two-part test, OAL must conclude that it is a "regulation" and subject to the APA. Furthermore, when applying the two-part test, OAL is mindful of the guiding principle set forth by the court in *Grier*:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"⁷

Background of the challenged rule

There have been numerous cases, both California and federal, defining the restrictions and limitations that may permissibly be placed on a prisoner's civil rights, including the right to correspond with others. The California Court of Appeal in *In re Grimes*⁸ stated:

"California law essentially parallels the federal, but adds specific statutory protections to prisoners' constitutional rights. . . . While prisoners, as a necessary corollary of prison life, forfeit certain rights and privileges enjoyed by the general populace, they retain 'those basic rights which are not incompatible with the running of the penal institution' [citation omitted]."⁹

The Department's Director's Rules, codified as Title 15, CCR, sections 3139 and 3140, provide for inmate correspondence with other inmates or with certain former inmates, with prior approval of the warden, superintendent or person in charge of the facility involved and of the case supervisor if either the sending or receiving correspondent is under parole, probation or outpatient supervision.

On December 28, 1989, the Department submitted to OAL for review¹⁰ an amendment of section 3139 and repeal of section 3140. The regulatory action would have prohibited correspondence between inmate and inmate, or inmate and former inmate, except for specified relationships (with immediate family members, co-parents, or co-litigants). On January 29, 1990, OAL disapproved the regulatory action for failure to comply with the APA "clarity," "necessity," and "reference" standards, and procedural requirements, including the lack of an

adequate summary and response to all public comments.

On December 13, 1989, Donald A. Miller submitted a request for determination challenging a rule of the California Men's Colony, San Luis Obispo which limited correspondence between inmates to immediate family, persons with whom the inmate had children, and co-litigants. No response was filed by the Department. On December 20, 1990, OAL issued a determination¹¹, which found the challenged rule was essentially the same as the proposed regulation which had been previously disapproved by OAL, that the challenged rule was not a "local rule," but rather was a "regulation" which had been implemented by local institutions in an attempt to circumvent the APA, and was invalid because it violated Government Code section 11347.5, subdivision (a) [now 11340.5].

Linda Tharp, while an inmate at the California Institution for Women ("CIW"), requested approval to correspond with a male inmate who was incarcerated, at that time, at R. J. Donovan Correctional Facility ("DCF"). Her request was denied because she was not married to the inmate, had no children with the inmate, and was not a co-defendant or co-litigator with the inmate. On July 29, 1991, Ms. Tharp appealed the denial of her request. At each level of appeal, the request was denied because the correspondents did not meet the criteria of the warden of CIW for inmate correspondence. The Director's level decision, issued on her appeal on October 25, 1991, states :

"... The institution cites CCR, Section 3139, stating that the authority to approve such correspondence rests with the warden, who at CIW, has restricted such correspondence to immediate family members, established common law relationships with children in common, and co-defendants or co-litigants with a current case under appeal. . . . The institution's denial of appellant's request for approval to correspond with inmate . . . at DCF is appropriate."

Throughout the appeal process, Ms. Tharp had argued the warden's criteria were an attempt to subvert the 1990 determination of OAL that this rule was an invalid regulation because it had not been adopted in compliance with the APA.

On January 21, 1992, Ms. Tharp filed this request for determination with OAL. On June 9, 1993, the Notice of Acceptance was sent to Ms. Tharp, as well as to the Director of the Department of Corrections and the Deputy Director of Legal

Affairs of the Department of Corrections. The Notice of Active Consideration was sent on July 27, 1998. No public comment was received. The Department filed a timely response in which it contended that the criteria restricting inmate correspondence to the specified exceptions was a "local rule" enacted by the CIW warden in compliance with CCR section 3139; therefore, it need not comply with the APA. The Department also contended that the issue was moot because the 1991 criteria have been superseded by a new procedure at CIW.¹²

A. IS THE CHALLENGED RULE A STANDARD OF GENERAL APPLICATION?

The issue presented is whether the challenged policy is a "local rule" which is not subject to the APA because it does not constitute a standard of general application.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.¹³

However, a different approach is taken in the case of rules applying to prisoners. California courts have long distinguished between: (1) statewide rules and (2) rules applying solely to one prison.¹⁴ In *American Friends Service Committee v. Procunier* (1973) (hereafter, "*Procunier*"),¹⁵ a case which overturned a trial court order directing the *Director of the Department* to adopt *departmental* rules and regulations pursuant to the APA, the California Court of Appeal stated:

"The rules and regulations of the Department are promulgated by the Director and are *distinguished from* the *institutional rules* enacted by each warden of the particular institution affected." (Emphasis added.)¹⁶

Procunier is especially significant because it was this case which the Legislature in essence abrogated by adopting the 1975 amendment to Penal Code section 5058 which specifically made the Department subject to the APA. The controversy was whether the statewide Director's Rules, the rules "promulgated *by the Director*" (emphasis added), were subject to APA requirements. The Director's rules were expressly distinguished in *Procunier* from "institutional rules enacted by each warden"

OAL has consistently taken the position, based on *Procunier*, that local prison rules are not subject to the APA. Since this request was filed, the Legislature has confirmed that "local" institutional rules are not subject to the APA. Since January 1, 1995, Penal Code section 5058, subdivision (c), has declared, in part, that:

"(c) The following are deemed *not* to be 'regulations' as defined in subdivision (b) [now subdivision (g)] of Section 11342 of the Government Code:

(1) Rules issued by the director or by the director's designee applying solely to a particular prison or other correctional facility, *provided that the following conditions are met:*

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code [the APA].

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public ."
[Emphasis added.]

This statutory language confirms that the Legislature intends for *local* prison rules to be exempt from APA adoption procedures, provided certain conditions are met.

In determining whether a "local rule" of the Department of Corrections is a standard of general application, OAL determines whether the rule, though officially designated as addressing a matter of only local concern, in reality addresses an issue of statewide importance.

Being labeled a "local rule" by the issuing agency is not dispositive. Whether a state agency rule constitutes a standard of general application does not depend solely on the official designation of the agency action. According to the

California Court of Appeal:

“[i]f the action is *not only of local concern, but of statewide importance*, it qualifies as a regulation despite the fact it is called ‘resolutions,’ ‘guidelines,’ ‘rulings’ and the like.”¹⁷

One indication of whether a particular matter should be deemed to be “of statewide importance” is whether the Department, *itself*, considered the matter of statewide importance by issuing pertinent *statewide* rules, in the California Code of Regulations, the DOM, another manual such as the Administrative Manual, or an administrative bulletin.

As noted above, under “Background of the Challenged Rule,” the Department attempted to amend section 3139 and repeal section 3140 of Title 15, CCR, but that regulatory action was disapproved by OAL. The Department then instituted “local rules” to govern inmate correspondence.

To allow the unlimited use of “local rules” to regulate matters of “statewide importance” would allow the “local rules exception” to swallow the rule requiring compliance with the APA.¹⁸

The agency response states:

“The Department contends that the [challenged rule] was a *local rule* enacted by the . . . warden in compliance with the CCR.” (Emphasis added.)¹⁹

OAL infers that the Department, as in earlier matters, contends essentially that the Folsom rule cannot be a standard of general application because it addresses “*unique*” circumstances at Folsom and does not apply statewide to all prisoners. The Department developed this argument at length in its agency response in 1988 OAL Determination No. 13, which concerned so-called “local rules” of the California Medical Facility (“CMF”). In this CMF matter, the Department argued that “[t]he issue now to be decided is whether certain operational procedures *unique* [to] CMF are rules of ‘general application.’ ” (Emphasis added.)^{20, 21} In 1988, OAL was informed by the Department that it was:

“currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of (1) transferring all regulatory material from manuals into the CCR, (2) combining all six existing manuals into a single more concise ‘Operations Manual,’ and (3) eliminating the duplicative material in the local ‘operations plans,’ while retaining in these plans material concerning *unique* local conditions.” (Emphasis added.)²² (n. 23)

OAL agrees that certain “local rules” concern matters *unique* to particular prisons, and that these “unique” matters should not be deemed to constitute rules of “general” application for reasons stated in 1988 OAL Determination No. 13.

For an example of a unique local rule, OAL turns to the San Quentin prison library rule cited by a 1970 California Supreme Court case:

“[Rule] 14. At maximum capacity, we can only accommodate 50 men at one time; after this amount the rule is ‘ONE MAN IN, AND ONE MAN OUT!!’ ”²³

This local rule responded to “practical limitations of space,”²⁴ i.e., unique circumstances at San Quentin involving the size of the room housing the library.

However, in the matter currently before OAL, the request for determination filed by Ms. Tharp, it is evident that the challenged rule is *not* a *local* rule. The rule is meant to apply to *all inmates* who want to correspond with other inmates or parolees.

(1) The rule at issue here is substantively identical to the regulatory action amending section 3139 and repealing section 3140 of Title 15, CCR. Therefore, it is a modification of existing regulations, which are rules of general application.

(2) The rule is virtually identical to, and an implementation of, the Department’s “Guidelines for Implementation of Director’s Rule 3139/3140, issued to all facilities approximately February 1989.”²⁵ The issuance of these “Guidelines” to all facilities clearly indicates the Department’s intent that the rule was of statewide importance and should be of statewide application, not merely discretionary by a warden or

superintendent of an individual facility. In the absence of information to the contrary from either party, OAL must assume the "Guidelines" were still being applied.²⁶

(3) The "local rule" issued by the California Institution for Women is essentially the same as the rule which was issued by the California Men's Colony at San Luis Obispo, which was the subject of 1990 OAL Determination No. 17.²⁷ Therefore, the rule is not "unique" to the circumstances at CIW.

Therefore, OAL concludes that the correspondence rule was in use at two prisons, the California Men's Colony at San Luis Obispo and the California Institution for Women. Since the rule (1) was in use in at least two prisons, (2) was not limited to the unique circumstances of one institution, and (3) involves a topic covered by statewide Guidelines, it is apparent that this rule is not only of local concern but of statewide importance. Therefore, the correspondence rule is a standard of general application.

B. DOES THE CHALLENGED RULE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

Penal Code section 5058, subdivision (a), declares that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons"

Penal Code section 5054 provides that:

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections]"

Penal Code section 2600 states:

"A person sentenced to imprisonment in a state prison may during that period of confinement be deprived of such rights, and only such rights, as is

reasonably related to legitimate penological interests. . . .”

Setting limits upon who inmates may correspond with clearly implements, interprets, and makes specific the laws enforced or administered by the Department.²⁸

Thus, the challenged rule is not only a standard of general application but also implements, interprets, and makes specific the laws enforced by the Department.²⁹ Both elements of the two-part test have been satisfied. *OAL concludes the challenged rule is a “regulation” within the meaning of Government Code section 11342.*

C. IS THE ISSUE MOOT?

OAL has found previously,³⁰ that subsequent laws or actions (e.g., rescission of the policy) by an agency do not change the obligation of OAL under its own statutes and regulations to issue a determination based upon the law and facts at the time the request was filed.

Therefore, even if CIW does have a new policy regarding correspondence between inmates, it does not render this request for determination moot. However, OAL makes no determination concerning whether the *new* policy is a “regulation” because there has been no request for such a determination.

III. DOES THE CHALLENGED RULE FALL WITHIN ANY *SPECIAL*³¹ EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

After this request was filed, the Department’s enabling act was amended to include several express exemptions from APA rulemaking requirements, including Penal Code section 5058, subdivision (c),³² quoted in Section II.B. of this determination. OAL is obliged to consider both the state of the law at the time the request was filed, and the state of the law as of the date this determination is issued.³³

Penal Code section 5058, subdivision (c), added in 1995, provides that rules

applying solely to a particular prison are not subject to the APA provided that *all* rules which apply to prisons throughout the state are adopted pursuant to the APA. Essentially, section 5058, subdivision (c), advises the Department of the need to abide by the APA as one of two conditions to the use of the "local rule exception."

OAL has already concluded that the correspondence rule was not a local rule under pre-1995 law. For the reasons set forth in Section II.B. of this determination, OAL further concludes that the correspondence rule does not fall within the local rule exception of Penal Code section 5058.

IV. DOES THE CHALLENGED RULE FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.³⁴ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.³⁵

INTERNAL MANAGEMENT

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

"Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.*" (Emphasis added.)

Grier v. Kizer provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall

within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . .*' [Fn. omitted.]' . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.]]³⁶

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,] and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ."³⁷

The challenged rule is a rule of general application which significantly affects the ability of the entire prison population in California, both male and female, to correspond with each other. Therefore, the internal management exception does not apply. The challenged rule does not fall within any general express statutory exemption from the APA. OAL concludes that the challenged rule restricting inmate correspondence is without legal effect since it had not been adopted in

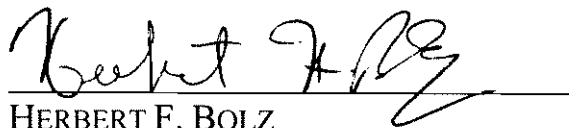
compliance with the APA.

CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) The rule restricting inmate correspondence with other inmates or parolees to immediate family members, co-parents, or current co-litigators is a "regulation," and therefore without legal effect unless adopted in compliance with the APA.
- (2) A "regulation" adopted by the Department, issued to institutions as a "guideline," and subsequently reviewed and disapproved by OAL, should not be issued or implemented by local institutions under the guise of a "local rule" in order to circumvent the APA.
- (3) The subsequent revision of the rule does not render the request for determination moot.

DATE: October 22, 1998



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ENDNOTES

1. This request for determination was filed by Linda Tharp, W-42037, California Institution for Women, Latham B 357L, Frontera, CA 91720. The agency's response was submitted by Pamela L. Smith-Steward, Deputy Director of the Legal Affairs Division, Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001. (916) 485-0495.
2. The APA would apply to the Department's rulemaking even if Penal Code section 5058 did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).
3. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., "local rules," see **1992 OAL Determination No. 2** (Department of Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
4. Penal Code section 5058, subdivision (c), codified case law regarding the local rule exception.
5. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

The *Tidewater* court, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

6. The *Grier* Court stated:

“The OAL’s analysis set forth a two-part test: ‘First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency’s procedure?’ (1987 OAL Determination No. 10, *supra*, slip op’n., at p. 8.)

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published after *Grier*, in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

7. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
8. (1989) 208 Cal.App.3d 1175, 1181, 256 Cal.Rptr. 690, 693.
9. Although Penal Code section 2600 has been amended since the *Grimes* decision to lighten the standard by which an inmate’s rights may be deprived, inmates continue to retain basic rights and may only be deprived of those “reasonably related to legitimate penological interests.” The *Grimes* decision remains in effect.
10. OAL file No. 89-1228-01.
11. **1990 OAL Determination No. 17**, (Department of Corrections, December 20, 1990, Docket No. 89-024), CRNR 91, No. 2-Z, p.71.
12. The Department submitted a copy of California Institution for Women (“CIW”) Operational Procedure, Number 306, dated March 1998, which now governs inmate correspondence at CIW.
13. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
14. See *In re Allison* (1967) 66 Cal.2d 282, 292, 57 Cal.Rptr. 593, 597-98 (rules prescribed by Director include "D2601," Rules of the Warden, San Quentin State Prison include "Q2601"); *In re Harrell* (1970) 2 Cal.3d 675, 698, n.23, 87 Cal.Rptr. 504, 518, n.23 ("Director's Rule" supplemented by "local regulation"--Folsom Warden's Rule F 2402); *In re Boag* (1973) 35 Cal.App.3d 866, 870, n. 1, 111 Cal.Rptr. 226, 227, n. 1 (contrasts "local" with "departmental" rules). See also *Department of Corrections*, 20 Ops.Cal.Atty.Gen. 259 (1952) ("the rules and regulations of the Department of Corrections *and* of the particular institution. . . .") (Emphasis added.)

15. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
16. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.
17. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
18. See 1998 OAL Determination No. 19, p. 10, CRNR, 98, No. 37-Z, p. 19
19. Response, p. 1.
20. Page 4.
21. See also 1988 OAL Determination No. 13, p. 14, CRNR 88, 38-Z. Sep. 18, 1988, p. 2957 (quoting agency response to the effect that CMF rules were needed to “meet the *unique* situation at CMF.”) (Emphasis added.)
22. note 23.
23. *In re Harrell* (1970) 2 Cal.3d 675, 695 n. 16, 87 Cal.Rptr. 504, 516 n. 16.
24. *Id.*, p. 516.
25. No issuance date is shown on the “Guidelines.” The “Guidelines” were submitted as Exhibit A in the request for determination filed by Donald A. Miller, which resulted in 1990 OAL Determination No. 17.
26. OAL was provided a copy of the Department of Corrections Administrative Bulletin Number 90/70, dated September 7, 1990, which rescinded the provisions of DOM subchapter 54010.14. This subchapter had listed the requirements necessary in order for an inmate to be approved to correspond with other inmates, as an immediate family member, a person other than the inmate’s current legal spouse with whom the inmate has children, a co-plaintiff, co-defendant, or witness in pending or in-progress litigation.

However, neither party provided any information whether the “Guidelines for Implementation of Director’s Rule 3139/3140” had been rescinded. In the absence of that information, OAL must assume the “Guidelines” were not rescinded.

27. The rule issued by the California Men’s Colony, San Luis Obispo, on July 6, 1988 stated:

“Approval for correspondence between inmates and inmates or parolees requires that the person requested as a correspondent be one of the following:

1. A relative by birth, marriage or legal adoption or a person having a bona fide

and verified foster relationship. Relatives shall be defined as: parents, children, legal spouses, siblings, aunts, uncles, first cousins, nephews, nieces, grandparents and grandchildren.

2. A person other than the inmate's current, legal spouse with whom the inmate has children.
3. An inmate who is a co-litigant.

It shall be the inmate's responsibility to show that the requirements have been met."

28. Penal Code section 2601 provides, in part:

"Subject only to the provisions of that section, each person described in Section 2600 shall have the following civil rights:

. . . (b) To correspond, confidentially, with any member of the State Bar or holder of public office, provided that the prison authorities may open and inspect incoming mail to search for contraband. . . ."

29. Penal Code section 4570 makes it a misdemeanor to communicate with an inmate without the permission of the warden or other officer in charge.
30. **1991 OAL Determination No. 4**, p. 85 (Department of Corrections, April 1, 1991, Docket No. 90-006), CRNR 91, No. 27-Z, July 5, 1991, p. 910; *Memorial, Inc. v. Harris* (9th Cir. 1980) 655 F.2d 905, 910, n. 14. *Also see* Title 1, CCR, section 126. OAL must respond to the request pursuant to its own regulations.
31. All state agency "regulations" are subject to the APA unless expressly exempted by statute. Government Code section 11346. Express statutory APA exemptions may be divided into two categories: special and general. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself). *Special* express statutory exemptions, such as Penal Code section 5058, subdivision (d)(1), which exempts Corrections' pilot programs under specified conditions, typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions, such as Government Code section 11342, subdivision (g), part of which exempts internal management regulations from the APA, typically apply across the board to all state agencies and are found in the APA.
32. See endnote 4.
33. **1998 OAL Determination No. 7** (Department of Social Services, Docket No. 91-001, June 18, 1998), typewritten version, p. 9, California Regulatory Notice Register 98, No. 30-Z, July 24, 1998, p. 1400.

34. Government Code section 11346.
35. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
- a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
 - c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings of *counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
 - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.
36. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
37. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.